

1 DAVID D. LAWRENCE, State Bar No. 123039
dlawrence@lbaclaw.com
2 DENNIS M. GONZALES, State Bar No. 59414
dgonzales@lbaclaw.com
3 NATHAN A. OYSTER, State Bar No. 225307
noyster@lbaclaw.com
4 LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
5 Glendale, California 91210-1219
Telephone No. (818) 545-1925
6 Facsimile No. (818) 545-1937

7 Attorneys for Defendant
Burbank Police Department Officer Gunn
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 PRESTON SMITH, an individual;

13 Plaintiff,

14 vs.
15

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
BURBANK POLICE DEPARTMENT
18 OFFICER GUNN; BURBANK
POLICE DEPARTMENT OFFICER
19 BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
20 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE
21

22 Defendants.
23
24

Case No. CV 10-08840 R (AGRx)

Honorable Manuel L. Real

**DECLARATION OF NATHAN A.
OYSTER AND EXHIBITS
THERE TO IN SUPPORT OF
OFFICER GUNN'S MOTION FOR
SUMMARY JUDGMENT**

Date: July 2, 2012

Time: 10:00 a.m.

Courtroom: 8

*[Officer Gunn's Notice of Motion and
Motion for Summary Judgment;
Separate Statement; and [Proposed]
Judgment filed concurrently herewith]*

25 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR COUNSEL
26 OF RECORD:

27 Defendant OFFICER NEIL GUNN, JR. (hereinafter "Officer Gunn")

28 ///

DECLARATION OF NATHAN A. OYSTER

I, Nathan A. Oyster, declare as follows:

1. The facts set forth herein are based on my personal knowledge or, as specified, upon my information and belief, based on official acts and writings. If called upon as a witness, I could and would testify competently to the facts contained herein under oath.

2. I am an attorney at law, duly licensed to practice before this Court and all of the courts of the State of California, and an associate of the law firm of Lawrence Beach Allen & Choi, PC, attorneys of record for Defendant OFFICER NEIL GUNN, JR. (hereinafter "Officer Gunn") in the above-captioned matter.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Complaint in this action.

4. Attached hereto as Exhibit "B" is a true and correct copy of the cover page, reporter's certificate, and relevant pages of Plaintiff Preston Smith's ("Plaintiff") Deposition taken on May 17, 2012.

5. Attached hereto as Exhibit "C" is a true and correct copy of the cover page, reporter's certificate, and relevant pages of Plaintiff Preston Smith's ("Plaintiff") Deposition taken on May 30, 2012.

6. Attached hereto as Exhibit "D" is a true and correct copy of Plaintiff's declaration which was filed in support of Plaintiff's Opposition to Motion for Judgment on the Pleadings and Application for an Order Denying, Deferring or Continuing Motion.

7. Attached hereto as Exhibit "E" is a true and correct copy of the misdemeanor complaint in *People v. Preston Smith*, LASC Case No. 9BR01353.

8. Attached hereto as Exhibit "F" is a true and correct copy of the misdemeanor sentencing memorandum in *People v. Preston Smith*, LASC Case No. 9BR01353.

9. Attached hereto as Exhibit "G" is a true and correct copy of the

1 misdemeanor plea form in *People v. Preston Smith*, LASC Case No. 9BR01353.

2 10. Attached hereto as Exhibit "H" is a true and correct copy of the
3 transcript, including the court reporter's certificate, for the April 29, 2009 hearing
4 in *People v. Preston Smith*, LASC Case No. 9BR01353, in which Plaintiff pled
5 guilty.

6 11. Attached hereto as Exhibit "I" is a true and correct copy of the
7 parties' stipulation indicating that Plaintiff's conviction for violating California
8 Penal Code § 148(a)(1) has not been expunged, withdrawn, or overturned.

9 12. Attached hereto as Exhibit "J" is a true and correct copy of Judge
10 Fairbank's May 13, 2011 Civil Minutes.

11 I declare under penalty of perjury under the laws of the State of California
12 and the United States of America that the foregoing is true and correct.

13 Executed on June 4, 2012, at Glendale, California.
14
15

16 /s/ Nathan A. Oyster

17 Nathan A. Oyster
18
19
20
21
22
23
24
25
26
27
28

1 hereby submits the following Declaration of Nathan A. Oyster and Exhibits
2 thereto in support of Officer Gunn's Motion for Summary Judgment.
3

4 Dated: June 4, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

5
6 By /s/ Nathan A. Oyster
7 Nathan A. Oyster
8 Attorneys for Defendant
9 Burbank Police Department Officer Gunn
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Manuel H. Miller, SBN 36947
Max A. Sauler, Esq. SBN 62634
LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation
20750 Ventura Boulevard, Suite 440
Woodland Hills, California 91364
Telephone: (818) 710-9993
Facsimile: (818) 710-1938

Attorney for Plaintiff Preston Smith

CONFORMED COPY
OF ORIGINAL FILED
Superior Court of California
County of Los Angeles

SEP 22 2010

John A. Clarke, Executive Officer/ Clerk
By RUGENA LOPEZ, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PRESTON SMITH, an individual;

Plaintiff,

vs.

CITY OF BURBANK; BURBANK POLICE
DEPARTMENT; BURBANK POLICE
DEPARTMENT OFFICER GUNN;
BURBANK POLICE DEPARTMENT
OFFICER BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
EDWARDS; and DOES 1-100, inclusive

Defendants.

Case No.:

COMPLAINT FOR DAMAGES FOR:

CIVIL RIGHTS VIOLATIONS
PURSUANT TO 42 U.S.C. §§ 1983
(First Cause of Action)

VIOLATION OF CALIFORNIA CIVIL
CODE section 52.1
(Second Cause of Action)

INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS
(Third Cause of Action)

ASSAULT AND BATTERY
(Fourth Cause of Action)

(Unlimited Jurisdiction: Damages Exceed
\$25,000.00)

[Request For Jury Trial]

COMES NOW, Plaintiff Preston Smith and alleges as follows:

I. PRELIMINARY ALLEGATIONS

1. Plaintiff PRESTON SMITH ("Plaintiff" or "Smith") is, and at all times relevant to this

1 complaint was, an individual residing in the County of Los Angeles, State of California.

2 2. Plaintiff Smith is ignorant of the true full names and capacities of defendants sued
3 herein as DOES 1-100, inclusive, and therefore sue these defendants by such fictitious names.

4 Plaintiff is informed and believe and therefore alleges that each defendant designated herein as a
5 DOE is legally responsible in some manner for the events and happenings herein referred to, and
6 caused injury and damages proximately thereby to Plaintiff as herein alleged. Plaintiff will amend
7 this complaint to allege their true names and capacities when ascertained.

8 3. Plaintiff is informed and believes, and thereon alleges, that at all times herein
9 concerned defendants, and each of them, were the agents, servants and employees of each of the
10 other defendants, and each of them, and at all times herein alleged were acting within the course and
11 scope of said agency and employment. All acts by defendants, and each of them, were ratified by
12 each and every corporate defendant, jointly and severally.

13 4. The acts and circumstances hereinafter alleged occurred in the State of California,
14 County of Los Angeles and CITY OF BURBANK.

15 5. Defendant CITY OF BURBANK is a public entity duly organized and existing under
16 and by virtue of the laws of the State of California.

17 6. Plaintiff is informed and believes that Defendant BURBANK POLICE
18 DEPARTMENT is a department and subdivision of Defendant CITY OF BURBANK.

19 7. Plaintiff is informed and believes and thereon alleges that at all times relevant herein,
20 BURBANK POLICE DEPARTMENT OFFICER GUNN (hereinafter DEFENDANT GUNN) was a
21 resident of the County of Los Angeles and was a police officer with the City of BURBANK and/or
22 the BURBANK. At all times relevant hereto, said defendant was acting within the course and scope
23 of his employment as an officer in the City of BURBANK. At all times relevant herein, said
24 defendant was acting under color of law, to wit, under the color of the statutes, ordinances,
25 regulations, policies, customs, practices and usages of defendant City of BURBANK, its police
26 department and/or the State of California.

27 8. At all times relevant herein, DEFENDANT GUNN was acting within the course and
28

1 scope of his employment as a police officer and employee of the BURBANK Police Department and
2 defendant City of BURBANK, which is liable in respondeat superior for said employees' state-law
3 torts pursuant to section 815.2 of the California Government Code.

4 9. Plaintiff is informed and believes and thereon alleges that at all times relevant herein,
5 BURBANK POLICE DEPARTMENT OFFICER BAUMGARTEN (hereinafter DEFENDANT
6 BAUMGARTEN) was a resident of the County of Los Angeles and was a police officer in the City
7 of BURBANK. At all times relevant hereto, said defendant was acting within the course and scope
8 of his employment as an officer in the City of BURBANK. At all times relevant herein, said
9 defendant was acting under color of law, to wit, under the color of the statutes, ordinances,
10 regulations, policies, customs, practices and usages of defendant City of BURBANK, its police
11 department and/or the State of California.

12 10. At all times relevant herein, DEFENDANT BAUMGARTEN was acting within the
13 course and scope of his employment as a police officer and employee of the BURBANK Police
14 Department and defendant City of BURBANK; which is liable in respondeat superior for said
15 employees' state-law torts pursuant to section 815.2 of the California Government Code.

16 11. Plaintiff is informed and believes and thereon alleges that at all times relevant herein,
17 BURBANK POLICE DEPARTMENT OFFICER EDWARDS (hereinafter DEFENDANT
18 EDWARDS) was a resident of the County of Los Angeles and was a police officer in the City of
19 BURBANK. At all times relevant hereto, said defendant was acting within the course and scope of
20 his employment as an officer in the City of BURBANK. At all times relevant herein, said defendant
21 was acting under color of law, to wit, under the color of the statutes, ordinances, regulations,
22 policies, customs, practices and usages of defendant City of BURBANK, its police department
23 and/or the State of California.

24 12. At all times relevant herein, DEFENDANT EDWARDS was acting within the course
25 and scope of his employment as a police officer and employee of the BURBANK Police Department
26 and defendant City of BURBANK, which is liable in respondeat superior for said employees' state-
27 law torts pursuant to section 815.2 of the California Government Code.

1 13. Plaintiff timely filed a claim for damages as required by California Government Code
2 § 900 et seq. with the City of BURBANK on or about December 2, 2009. On March 24, 2010 the
3 City of BURBANK provided notice of the denial of the Plaintiff's claim.

4 14. Venue is proper in this Court because all of the events alleged herein occurred within
5 the County of Los Angeles, all defendants conduct operations within the County of Los Angeles, and
6 all witnesses either work or live within the County of Los Angeles.

7 **II. FACTS COMMON TO ALL CAUSES OF ACTIONS**

8 15. Plaintiff repeats and realleges each and every allegation and statement contained in
9 paragraphs 1 through 14, inclusive, and incorporates the same herein with the same force and effect
10 as though fully set forth herein.

11 16. On or about April 10, 2009 Plaintiff Smith and others were being questioned by
12 certain Burbank police officers as they were walking in the vicinity of a liquor store in the City of
13 Burbank.

14 17. After being questioned by the police officer, Plaintiff was "tasered" in his lower back
15 by Defendant GUNN, causing Plaintiff to fall to the ground and become immobilized. While lying
16 immobilized on the ground, face down, Plaintiff verbally surrendered and told Defendant GUNN
17 "OK, you've got me." Plaintiff remained face down on the ground and did not attempt to move or
18 stand up, at which time Defendant GUNN "tasered" him and second and third time, causing Plaintiff
19 to have convulsions. Plaintiff, while still immobilized on the ground, reiterated an unequivocal
20 surrender and told Defendant GUNN *"please don't shock me again sir, I'm not a bad person, I'm*
21 *not a bad person."* Defendant GUNN was laughing hysterically at Plaintiff. Defendant GUNN then
22 told Plaintiff *"fuck you, asshole, how do you like that. that will teach you to run"* at which time
23 Defendant GUNN "tasered" Plaintiff a fourth time. Plaintiff sensed he could not breathe and thought
24 he was going to die due to Defendant GUNN's actions. Plaintiff screamed for help, at which time
25 Defendant GUNN proceeded to "taser" Plaintiff a fifth time, causing more extensive convulsions and
26 leading Plaintiff to believe he was going to die by electrocution.

27 18. Following the fifth "taser" assault upon the Plaintiff, Plaintiff heard other police
28

1 officers approaching in close vicinity at which time one of the police officers shouted at Defendant
2 GUNN "why can't we hear you on your radio." Defendant GUNN proceeded to "taser" Plaintiff a
3 sixth time. Plaintiff started screaming "*he's killing me, he's killing me,*" at which time Defendant
4 BAUMGARTEN upon arriving at the scene shouted at Plaintiff to "*turn on your stomach and shut*
5 *the fuck up.*" Thereafter, Defendant BAUMGARTEN smashed his knees into the Plaintiff's back
6 and kidney area. Plaintiff thereafter felt Defendant BAUMGARTEN strike Plaintiff with a solid
7 object. Defendant GUNN then struck Plaintiff in the head with his flashlight, causing Plaintiff's
8 head to be split open and bleed profusely. As Plaintiff's head was jolted aside by the blow,
9 Defendant GUNN shouted to Plaintiff to "*shut the fuck up*" and proceeded to strike Plaintiff's head a
10 second time with his flashlight, splitting Plaintiff's head open in a second place. Thereafter a police
11 officer grabbed Plaintiff's right arm and twisted it violently causing ligament damage to Plaintiff's
12 arm. The police officers then placed handcuffs on Plaintiff so tightly that they cut-off the blood
13 circulation from his right wrist and thumb, while another officer remained on Plaintiff's back and
14 another held Plaintiff's head to the ground with his foot.

15 19. Plaintiff was thereafter taken by ambulance to St. Josephs Hospital in Burbank for
16 emergency medical treatment. While in the hospital Plaintiff overheard a Burbank Police
17 Department Sargeant instruct another Burbank Police Department officer to falsely state in his police
18 report that the police located cocaine inside of Plaintiff's vehicle.

19 III.

20 FIRST CAUSE OF ACTION

21 (FOR VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS

22 PURSUANT TO 42 U.S.C. §1983)

23 20. PLAINTIFF repeats, realleges and incorporates each and every allegation of
24 paragraphs 1 through 14 in Section I and paragraphs 14 through 19 in Section II above as though
25 fully set forth herein.

26 21. This action is brought pursuant to 42 U.S.C. §1983 and the Fourth Amendment of the
27 United States Constitution.

1 22. At all times relevant hereto, PLAINTIFF possessed the right, guaranteed by the
2 Fourth Amendment of the United States Constitution, to be free from unreasonable searches,
3 seizures, and uses of force by police officers acting under the color of law.

4 23. As described above, Defendants GUNN, BAUMGARTEN and EDWARDS violated
5 PLAINTIFF Smith's Fourth Amendment rights by unlawfully and unreasonably battering and
6 torturing him and by "planting" cocaine in his vehicle and thereafter falsifying the police report(s) as
7 they pertained to Plaintiff's arrest. In doing these things, said Defendants GUNN, BAUMGARTEN
8 and EDWARDS acted specifically with the intent to deprive PLAINTIFF of his constitutional rights
9 under the Fourth Amendment to be free from unreasonable use of force. Said Defendants GUNN,
10 BAUMGARTEN and EDWARDS subjected PLAINTIFF to the aforementioned deprivations by
11 either actual malice, deliberate indifference or a reckless disregard of his rights under the U.S.
12 Constitution. Said Defendants GUNN, BAUMGARTEN and EDWARDS acted at all times herein
13 knowing full well that the established practices, customs, procedures and policies of the BURBANK
14 Police Department would allow a cover-up and allow the continued violation of the Fourth
15 Amendment of the Constitution of the United States.

16 24. On the date of PLAINTIFF having been subjected to battery by the Burbank Police
17 Department officers as indicated above, Defendants GUNN, BAUMGARTEN and EDWARDS,
18 acting within the course and scope of their duties as peace officers of the CITY OF BURBANK,
19 depriving PLAINTIFF of his rights to be free from unreasonable use of force and torture as
20 delineated herein above, and thereafter in violation of PLAINTIFFS' due process rights proceeded to
21 illegally assault and batter PLAINTIFF, falsify evidence, submit false police reports and offer
22 perjurious testimony so as to ensure that PLAINTIFF would be wrongfully charged.

23 25. At the time of these constitutional violations by Defendants GUNN, BAUMGARTEN
24 and EDWARDS, Defendant CITY OF BURBANK had in place, and had ratified customs and
25 practices which permitted and encouraged their police officers to unjustifiably, unreasonably and in
26 violation of the Fourth Amendment, to unlawfully arrest persons without probable cause, to commit
27 random and wanton acts of violence against people with no legal justification, plant evidence, falsify
28

1 police reports and present perjured testimony to ensure the wrongful conviction of persons.

2 26. Said customs and practices also called for the Defendant CITY OF BURBANK and
3 the BURBANK Police Department not to discipline, prosecute, or objectively and/or independently
4 investigate or in any way deal with or respond to known incidents and complaints of unreasonable
5 and illegal searches and beatings, false arrests, falsification of evidence, the preparation of false
6 police reports to justify such wrongful conduct, and the giving of false testimony in trial to cover-up
7 and conceal such wrongful conduct by officers of the BURBANK Police Department and its various
8 Divisions, and for the Defendant CITY OF BURBANK to fail to objectively and/or independently
9 investigate or in any way deal with or respond to or the related claims and lawsuits made as a result
10 of such false arrests, illegal uses of force, and related misconduct.

11 27. Defendant CITY OF BURBANK was aware of and was deliberately indifferent to a
12 pervasive and widespread pattern and practice with the BURBANK Police Department of concealing
13 known instances of illegal, excessive and unreasonable use of force, falsified police reports, witness
14 coercion, on-duty criminal acts and on-duty acts of moral turpitude. Said Defendant failed to take
15 any reasonable measures to correct this pattern and practice and as a result said city and persons have
16 been deliberately indifferent to the civil rights violations which resulted, including those which are
17 described in the present claim.

18 28. Said customs and practices called for and led to the refusal of said Defendant CITY
19 OF BURBANK to investigate complaints of previous incidents of illegal uses of excessive force, the
20 filing of false police reports to conceal such misconduct, the falsification of evidence and perjury
21 and, instead, officially claim that such incidents were justified and proper.

22 29. Said customs and practices called for said Defendant, by means of inaction and
23 coverup, to encourage an atmosphere of lawlessness within the police department and to encourage
24 their police officers to believe that excessive use of force against residents of BURBANK and of Los
25 Angeles County or persons present therein, the submission of false police reports, and the
26 commission of perjury was permissible and to believe that unlawful acts of falsification of evidence,
27 excessive use of force, and perjury would be overlooked without discipline or other official
28

1 ramifications.

2 30. Said customs and practices of said Defendant CITY OF BURBANK evidenced a
3 deliberate indifference to the violations of the constitutional rights of PLAINTIFF. This indifference
4 was manifested by the failure to change, correct, revoke, or rescind said customs and practices in
5 light of prior knowledge by said Defendant and its subordinate policy makers of indistinguishably
6 similar incidents of unjustified and unreasonable and unlawful arrests, illegal and excessive uses of
7 force, falsification of evidence, submission of false police reports and perjury.

8 31. Other systemic deficiencies of said Defendant CITY OF BURBANK which indicated,
9 and continue to indicate, a deliberate indifference to the violations of the civil rights by the officers
10 of the BURBANK Police Department include:

- 11 i. preparation of investigative reports designed to vindicate and/or justify false and
12 unlawful searches and arrests;
- 13 ii. preparation of investigative reports which uncritically rely solely on the word of
14 officers involved in unlawful arrests or in the planting of evidence and which
15 systematically fail to credit testimony by non-officer witnesses;
- 16 iii. preparation of investigative reports which omit factual information and physical
17 evidence which contradicts the accounts of the officers involved;
- 18 iv. issuance of public statements exonerating officers involved in such incidents prior to
19 the completion of investigations of wrongful arrests.
- 20 v. failure to maintain centralized department-wide system for the tracking and
21 monitoring tort claims and lawsuits alleging illegal searches, false arrests,
22 planting of evidence, perjury, abuse of authority, illegal and unjustified uses of
23 excessive force, and race-based misconduct by individual officers so as to
24 identify those officers who engage in a pattern of abuse of police authority and
25 police misconduct.

26 32. Said Defendant CITY OF BURBANK also maintained a system of grossly inadequate
27 training pertaining to the lawful making of arrests, police ethics, the law pertaining to searches and
28

1 seizures, testifying in trial and perjury, the use of force, the collection of evidence, and the
2 preparation of police reports.

3 33. The foregoing acts, omissions, and systemic deficiencies are customs and practices of
4 said defendant and such caused, permitted and/or allowed under official sanction Defendants GUNN,
5 BAUMGARTEN and EDWARDS to be unaware of, or intentionally overlook and ignore, the rules
6 and laws governing the laws and requirements for arrests as well as the use of force. The foregoing
7 acts, omissions, and systemic deficiencies are customs and practices of said Defendant and such
8 caused, permitted and/or allowed under official sanction said Defendants GUNN, BAUMGARTEN
9 and EDWARDS to believe that searches and arrests are entirely within the discretion of the officer
10 and that improper and unlawful searches and arrests, filing of false and misleading police reports,
11 and the commission of perjury, as well as the use of excessive force, would not be objectively,
12 thoroughly and/or properly investigated, all with the foreseeable result that Defendant's officers
13 would make false and unlawful searches and arrests, and falsify evidence, submit false and
14 misleading police reports, and commit perjury, employ excessive force, and thereby violate the civil
15 rights of the citizens of this state with whom said officers would come into contact with.

16 34. As a result of the aforementioned acts, omissions, systematic deficiencies, customs
17 and practices, Defendants GUNN, BAUMGARTEN and EDWARDS unlawfully utilized excessive
18 force and torture upon PLAINTIFF, and developed and implemented a plan to unlawfully secure
19 prosecution, conviction and imprisonment through the offering of false and misleading police reports
20 and the presentation of falsified evidence and perjurious testimony.

21 35. As a direct and proximate result of the aforementioned acts of said Defendants,
22 PLAINTIFF suffered the violation of his constitutional rights as described above. As the further
23 actual and proximate result of the acts and omissions of said defendants, as described herein,
24 PLAINTIFF was made to suffer and sustain severe physical injury and continues to suffer, severe
25 emotional and psychological pain, suffering, anxiety, depression, anguish, shock, and fear and loss of
26 income.

27 36. The aforementioned acts of said Defendants were willful, wanton, malicious and
28

1 oppressive thereby justifying the awarding of exemplary and punitive damages as to said Defendants.

2 IV.

3 SECOND CAUSE OF ACTION

4 (VIOLATION OF CALIFORNIA CIVIL CODE § 52.1

5 (As To Police Officer Defendants GUNN, BAUMGARTEN and EDWARDS)

6 37. PLAINTIFF repeats, realleges and incorporates each and every allegation of
7 paragraphs 1 through 36 above as though fully set forth herein.

8 38. When Defendants, and each of them, engaged in the conduct described above, they
9 violated Plaintiff's civil rights under California's civil rights laws.

10 39. Defendants engaged in the conduct described above in an unnecessary and
11 unreasonable manner. A reasonable police officer upon approaching Plaintiff as set forth above
12 would not have engaged in the above described conduct and would not have effectuated the battery
13 and torture of Plaintiff Smith.

14 40. Defendants acted unreasonably, without provocation, and with malice. The detention
15 and intimidation, with deliberate acts of battery, electronic torture against Plaintiff Smith constituted
16 specific threats and coercive actionable conduct by Defendants against him. The actions of
17 Defendants GUNN, BAUMGARTEN and EDWARDS, made under color of law, were intended to
18 and did wrongfully intimidate and injure Plaintiff Smith and caused him to be placed in fear for his
19 personal safety.

20 41. The aforementioned acts of said Defendants were willful, wanton, malicious and
21 oppressive thereby justifying the awarding of exemplary and punitive damages as to said Defendants.

22 V.

23 THIRD CAUSE OF ACTION

24 (BY PLAINTIFF Smith FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
25 AGAINST POLICE OFFICER DEFENDANTS GUNN, BAUMGARTEN and EDWARDS)

26 42. PLAINTIFF repeats, realleges and incorporates each and every allegation of
27 paragraphs 1 through 41 above as though fully set forth herein.

1 43. Defendants GUNN, BAUMGARTEN and EDWARDS had a duty and obligation to
2 perform their employment, conform their conduct, and execute laws and regulations in a lawful and
3 reasonable manner.

4 44. Defendants GUNN, BAUMGARTEN and EDWARDS, by engaging in the conduct
5 hereinabove alleged, including the battery and electronic torture committed upon Plaintiff Smith,
6 intended to cause Plaintiff Smith severe emotional distress. Defendants' conduct as hereinabove
7 alleged against Plaintiff Smith was extreme and outrageous conduct.

8 45. Defendants GUNN, BAUMGARTEN and EDWARDS knew, or should have known
9 with a substantial certainty that their conduct in the above INCIDENT would subject Plaintiff Smith
10 to severe emotional distress and would seriously and substantially harm Plaintiff Smith. Defendants
11 GUNN, BAUMGARTEN and EDWARDS knew that they had power and control over Plaintiff
12 Smith, and they perpetrated the acts described in this complaint with the intent to inflict such harm
13 and severe emotional distress upon Plaintiff Smith and or acted in perpetrating the heinous,
14 retaliatory, and indecent acts described herein, with the knowledge that such harm and severe
15 emotional distress was substantially certain to befall Plaintiff Smith as a result, or with reckless
16 disregard for the substantial certainty that such harm would befall Plaintiff Smith.

17 46. The conduct perpetrated by Defendants GUNN, BAUMGARTEN and EDWARDS
18 was and is a perpetrated malicious design and intent to harm and inflict pain and suffering and
19 extreme emotional and mental distress on Plaintiff Smith.

20 47. As a direct result of Defendants actions, Plaintiff Smith suffered and continues to
21 suffer from severe emotional distress, physical injury and loss of income.

22 48. The aforementioned acts of said Defendants were willful, wanton, malicious and
23 oppressive thereby justifying the awarding of exemplary and punitive damages as to said Defendants.

24 //

25 //

26 //

27 //

28 //

VI.

FOURTH CAUSE OF ACTION

(BY PLAINTIFF Smith FOR ASSAULT AND BATTERY AGAINST
AGAINST POLICE OFFICER DEFENDANTS GUNN,
BAUMGARTEN and EDWARDS)

49. PLAINTIFF repeats, realleges and incorporates each and every allegation of paragraphs 1 through 48 above as though fully set forth herein.

50. Defendants GUNN, BAUMGARTEN and EDWARDS had a duty and obligation to perform their employment, conform their conduct and execute laws and regulations in a lawful and reasonable manner.

51. Defendants GUNN, BAUMGARTEN and EDWARDS while engaging in the conduct hereinabove alleged, including the including the assault and battery and electronic torture committed upon Plaintiff Smith, deliberately assaulted and battered Plaintiff Smith without his consent.

52. Such actions of assault and battery and electronic torture upon Plaintiff Smith was without his consent and, as a direct result of Defendants' actions, Plaintiff Smith suffered physical and emotional injuries and continues to suffer from severe emotional distress.

53. The aforementioned acts of said Defendants were willful, wanton, malicious and oppressive thereby justifying the awarding of exemplary and punitive damages as to said Defendants.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. General damages in an amount according to proof;
2. Special damages in an amount according to proof;
3. Exemplary and punitive damages in an amount according to proof as to the First, Second, Third, Fourth causes of action;
4. Interest as allowed by law;
5. Plaintiffs' costs of suit incurred herein;

6. Attorney's fees as allowed by code, and;

7. Such other and further relief a may be just and proper.

Date: September 21, 2010

LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation

By



MAX A. SAULER, Esq.
Attorney for Plaintiff

EXHIBIT B

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3

4 PRESTON SMITH, an individual;)
5 Plaintiff,)
6 vs.) No. CV 10-08840-R-AGR
7 CITY OF BURBANK, BURBANK POLICE)
8 DEPARTMENT, BURBANK POLICE)
9 DEPARTMENT OFFICER GUNN; BURBANK)
10 POLICE DEPARTMENT OFFICER)
11 BAUMGARTEN; BURBANK POLICE)
12 DEPARTMENT OFFICER EDWARDS; AND)
13 DOES 1 THROUGH 100, INCLUSIVE,)
14 Defendants.)
15 _____)
16

17 DEPOSITION OF PRESTON SMITH

18 Burbank, California

19 Thursday, May 17, 2012

20 Volume I
21

22 Reported by:

SHELLEY HOLMES

23 CSR No. 9482

24 Job No. 145073

25 PAGES 1 - 148

Page 1

1 to.

2 MS. HUMISTON: And you will stipulate that he is
3 following your instructions when you answer?

4 MR. COLETTI: I will.

5 MS. HUMISTON: On all of the occasions when you 02:04PM
6 have instructed him not to answer?

7 MR. COLETTI: Yes.

8 MS. HUMISTON: And in the future so we don't have
9 to go through that?

10 MR. COLETTI: Yes. Sure. 02:04PM

11 BY MS. HUMISTON:

12 Q Now, Mr. Smith, you pled guilty to charges
13 arising out of your arrest on April 10th, 2009; correct?

14 A Yes.

15 Q And one of those was, "Used elbows and hands 02:04PM
16 and a fist to strike Officer Baumgarten, Officer
17 Edwards, Officer Joel Rodriguez, and Officer Gunn during
18 an attempt to lawfully restrain the defendant."

19 So do you recognize Officer Edwards to my left?

20 A I didn't plead guilty to that. 02:05PM

21 Q Well, you did.

22 A No, I didn't.

23 Q Whether you like it or not, you did?

24 A No, I did not. That was not stipulated
25 anywhere I said that. 02:05PM

Page 106

1
2
3
4
5 I, the undersigned, a Certified Shorthand
6 Reporter of the State of California, do hereby certify:

7 That the foregoing proceedings were taken before me
8 at the time and place herein set forth; that any
9 witnesses in the foregoing proceedings, prior to
10 testifying, were placed under oath; that a verbatim
11 record of the proceedings was made by me using machine
12 shorthand which was thereafter transcribed under my
13 direction; further, that the foregoing is an accurate
14 transcription thereof.

15 I further certify that I am neither financially
16 interested in the action nor a relative or employee of
17 any attorney of any of the parties.

18 IN WITNESS WHEREOF, I have this date subscribed my
19 name.

20
21 Dated: June 1, 2012
22
23

24 _____
SHELLEY HOLMES

CSR No. 9482

25 02:56 PM

Page 148

EXHIBIT C

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3
4

5 PRESTON SMITH, an individual,)
6)

6 Plaintiff,)
7)

7 vs.)

No. CV10-08840-4-AGR
8)

8 CITY OF BURBANK, BURBANK POLICE)
9)

9 DEPARTMENT, BURBANK POLICE)
10)

10 DEPARTMENT OFFICER GUNN; BURBANK)
11)

11 POLICE DEPARTMENT OFFICER)
12)

12 BAUMGARTEN; BURBANK POLICE)
13)

13 DEPARTMENT OFFICER EDWARDS; AND)
14)

14 DOES 1 THROUGH 100, INCLUSIVE,)
15)

15 Defendants.)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

DEPOSITION OF PRESTON SMITH

Burbank, California

Wednesday, May 30, 2012

Volume II

Reported by:

SUSAN C. CAMPANA

CSR NO. 9573, RPR

Job No. 146812

Pages 149-420

Page 149

1 I'm sorry.

2 Q. And did you see what officer hit you with the
3 flashlight?

4 A. At that point, no.

5 Q. Well, from what you can feel when the flashlight
6 hit your shoulder blade twice, was it a blow where it was
7 across the back or directly down onto the --

8 A. Directly down onto it.

9 Q. And after you were struck the first time, did it
10 cause your body to move?

11 A. No.

12 Q. So he didn't hit you that hard?

13 A. The blows to the back -- it was just more on the
14 muscle part of my shoulder blade. So it really didn't
15 hurt as bad as it would have if it would have been on a
16 bone or something.

17 Q. So when you say it was -- when you say you were
18 struck on your shoulder blade twice with a flashlight,
19 you mean you were struck on the muscle near your
20 shoulder?

21 A. Right. Well, I got muscle all over my shoulder
22 blade right there. So...

23 I mean, even if you were to take a flashlight
24 right now and hit me hard with it, it wouldn't do a lot
25 of damage like it would to somebody else.

1 Q. Yeah. I can imagine.

2 So it didn't -- being struck twice in the
3 shoulder area with the flashlight didn't cause you to
4 jerk your body or --

5 A. No. Not at that --

6 Q. -- move that much because you're very fit?

7 A. No. It did not cause me to move.

8 Q. Okay. And it didn't hurt that much?

9 A. No.

10 Q. And do you know where the person was standing at
11 the time you were struck in the -- in the shoulder muscle
12 two times with a flashlight?

13 A. I could feel his presence, like, right on top of
14 me, maybe -- possibly a hand on my back for his -- for
15 his leverage. I don't really know exactly at that point.

16 Q. Well, when you say you could feel his presence,
17 was it somebody to your left? Was it somebody to your
18 right? to the front? towards your feet?

19 A. No. It was somebody -- it was somebody to my
20 right. Probably right in front of the other officer --
21 definitely in front of the other officer that was down my
22 by my right -- lower-right side.

23 Q. So it's somebody that was in your presence, to
24 your right, but -- but not down towards your feet?

25 A. No. It's somebody that was right above the guy

1 Q. Really? Who are they?

2 A. I have no idea, but...

3 Q. Well, that was the neighborhood you were used to
4 frequenting.

5 A. Right.

6 Q. Did you find any witnesses?

7 A. The -- the Taser gun shows -- I believe it
8 records how many times.

9 Q. Well, it records how many times it was fired --

10 A. Yes.

11 Q. -- correct?

12 The question to you is, did you find two holes
13 that indicated that both Tasers went into your body?

14 A. No, I did not.

15 Q. Did you find any holes in any of your clothing,
16 your belt, or anything else that indicated that --

17 A. In my belt.

18 Q. -- that two Tasers went into my body?

19 A. In the belt.

20 Q. In the belt.

21 And in the location where the belt was on your
22 body, is that consistent where the one hole was with your
23 body?

24 A. I don't remember. All I know is that I got
25 Tasered to the extreme.

Page 265

1 Q. Have you ever talked to anybody how you could be
2 Tasered to the extreme when you didn't have two Tasers --

3 A. I don't need to.

4 Q. -- that entered your body?

5 A. I know what happened to me.

6 Sorry.

7 MR. COLETTI: Just listen to the question. Wait
8 until she's finished. And just answer that question.

9 Q. BY MS. HUMISTON: Did the doctor talk to you
10 about the fact that you did not have two Taser holes in
11 your body?

12 A. They -- when they had it on video -- they were
13 videotaping it, and they were looking --

14 MR. COLETTI: The question just calls for a "yes" or
15 "no."

16 THE WITNESS: No -- or yes.

17 Q. BY MS. HUMISTON: And what did the doctor tell
18 you?

19 A. I don't actually remember the doctor talking to
20 me about it. I remember the officers talking in front of
21 me with the doctor.

22 Q. So the doctor didn't tell you anything while you
23 were at the hospital that you recall at all?

24 A. He asked me some questions.

25 Q. Well, what specific questions did the doctor ask

1 kind of lit up.

2 Q. The yard was lit up?

3 A. Not, like, lit up, lit up. But, I mean, I could
4 see where I was landing. I could see what was in front
5 of me. I could see Officer Gunn on the wall.

6 Q. But the alley was dark?

7 A. The alley -- the alley was pretty dark.

8 Q. So as you were running down the alley, could you
9 see where you were going, or you just knew your way?

10 A. Yeah. I could see where I was going. I could
11 see -- I could pretty much see the end of the alley. And
12 plus, I -- I know the neighborhood. So I knew where the
13 end of the alley was at.

14 Q. You knew where the end of the alley was?

15 A. Yes.

16 Q. And when you got to the end of the alley, is
17 that when you went over the wall?

18 A. No. It had about -- I was only about halfway --
19 halfway down the alley, maybe only a quarter of the way.
20 And I thought -- I figured that an officer was going to
21 be driving up the alley and --

22 Q. Why did you figure that?

23 A. Because of -- I figured he had a radio, he would
24 have called for backup.

25 Q. And you assumed they'd be coming from that

1 Q. What did you do during those ten minutes?

2 A. I went towards Mario's house. I never went
3 inside. I asked him about the cell phone battery. I
4 hadn't got around to asking him about the cocaine. I
5 think he volunteered some information that he didn't have
6 any or not much or whatever.

7 And so I went back -- I just asked if he could
8 get the cell phone batteries. And that's when he brought
9 the cell phones out.

10 Before the cop even came up, I just said, "Hey,
11 let's go get some alcohol."

12 And he said, "Okay."

13 So we started walking across. I hadn't really
14 talked to him much at all.

15 Q. So for how long had you been back in the parking
16 lot when you first noticed the Burbank police officer?

17 A. We were walking -- we were walking through the
18 parking lot. So I guess it might be 30 seconds to a
19 minute -- 30 to 45 seconds.

20 Q. Was Mario the only person that was with you?

21 A. Yes.

22 Q. Where was Yesenia at that time?

23 A. In the truck.

24 Q. Okay. And when you first -- strike that.

25 What first made you aware that there was a

1 Burbank police officer in the vicinity?

2 A. We were -- as we were walking, you could see
3 him. He pulled, like, into the turning lane, and he was
4 going real slow, like looking at us.

5 Q. And was that Officer Gunn?

6 A. Yes.

7 Q. What did Officer Gunn do next?

8 A. He turned left and pulled in the parking lot.
9 As he's coming up the curb, his car was, like -- the tail
10 end of it was still out on the street.

11 Q. Did he stop the vehicle before fully entering
12 the parking lot?

13 A. Yes.

14 Q. And did he get out of the car?

15 A. While he was still in the car, he asked if
16 either one of us -- no. He asked -- he asked if either
17 one of us was on probation or parole. And we both said
18 no.

19 Q. And he said that while he was still in the car?

20 A. Yes.

21 Q. Did he have either of his windows down?

22 A. Yes. He had his driver's side window down.

23 Q. And was the driver's side window the closest
24 window to where you were at the time?

25 A. I believe it was the passenger window.

1 A. No. I was actually planning on going back to
2 Van Nuys, where we were. When we left, we had no drugs.
3 So I had no reason to have anything with me.

4 Q. After Officer Gunn asked what was thrown, was
5 there a response from either you or Mario?

6 A. Yeah. Mario said, "Nothing was thrown."

7 Q. And at this point, are you stopped, or are you
8 still moving?

9 A. No. We were kind of stopped -- we were stopped
10 and looking at him, talking to him.

11 Q. How far away were you from Officer Gunn's car
12 when this discussion is happening?

13 A. Two feet.

14 Q. Did anything else happen before Officer Gunn got
15 out of his vehicle?

16 A. He asked us to stand in front of his vehicle as
17 he exited his vehicle.

18 Q. And you understood that to mean the front
19 with -- towards the hood of the car?

20 A. Yes.

21 Q. Did you comply with that?

22 A. Yes.

23 Q. Did Mario comply with that?

24 A. Yes.

25 Q. And how exactly did you comply with it

1 physically?

2 A. Walked to the front of the vehicle.

3 Q. Did you put your hands on the hood?

4 A. I don't think I -- no. I was smoking a
5 cigarette at the time.

6 Q. Did Mario put his hands on the hood?

7 A. I don't believe so.

8 Q. Were you facing the hood of the vehicle or
9 facing away from it?

10 A. I was actually watching the officer going that
11 direction with his flash- -- oh, yeah. He had a
12 flashlight. Looking on the ground.

13 Q. Where did -- well, strike that.

14 Did you see Officer Gunn get out of the car?

15 A. Yes, I did.

16 Q. Did he walk towards the front of his vehicle or
17 towards the rear of his vehicle?

18 A. Towards the front.

19 Q. So he walked in the direction that you and Mario
20 were?

21 A. Yeah. And kind of -- diverted off to the left
22 as he was walking.

23 Q. And he was illuminating something on the ground?

24 A. Yes.

25 Q. And you understood it at the time that he was

1 looking for something that may have been thrown?

2 A. Yes.

3 Q. As Officer Gunn was illuminating an object on
4 the ground, was anything said between any of the three of
5 you?

6 A. No.

7 Q. What happened next?

8 A. I was kind of whispering to Mario. I go, "Fuck,
9 Mario. I'm" -- "I'm on parole, you know, and I'm
10 nervous."

11 And Mario said, "Just relax."

12 And -- I think had he not of walked away looking
13 for something, I might not have ran. Because I -- I
14 wasn't really panicked until he started doing that. And
15 then I -- it kind of just concerned me. And I really
16 thought I could just run away and get away. I didn't
17 think we were going to have any confrontation. I just
18 thought I'd get away.

19 Q. So as Officer Gunn continued to look for the
20 object, then you got concerned that this could have more
21 serious problems for you?

22 A. Yes. I started thinking about it, about the
23 consequences of being on parole.

24 Q. And you thought you'd be able to just simply
25 outrun Officer Gunn?

Page 390

1 first corner. Right -- when I almost tripped and
2 stumbled, I knew he was right behind me, and I got
3 nervous.

4 Q. Once you realized he was chasing you, what was
5 your plan then?

6 A. Well, I still -- I still thought I was going to
7 be able to get away. I still didn't think there was
8 going to be a problem. I was -- I was nervous and
9 scared, though. I didn't want to be in that situation.

10 Q. How long were you running before you reached the
11 wall that you eventually went over in terms of, let's
12 say, seconds or minutes, in terms of time?

13 A. 30 to 40 seconds.

14 Q. So in those 30 to 40 seconds, did Officer Gunn
15 say anything to you?

16 A. No. I don't remember him saying anything.

17 Q. Did he tell you to stop?

18 A. No. I don't remember that.

19 Q. Did you say anything to Officer Gunn during
20 those 30 to 40 seconds --

21 A. Just running down the alley, I said, "Don't
22 shoot me."

23 Q. And that's what you said earlier. You said --
24 you were telling him, "Don't shoot me," during those 30
25 to 40 seconds?

1 Q. How long did each of the Taser shocks last?

2 A. It seemed like forever, but I guess I would say
3 maybe seven to ten seconds.

4 Q. And was there a gap between each of the Tasers?

5 A. Yes. Every gap seemed to be almost identical.

6 Q. How long were the gaps?

7 A. Just a few seconds.

8 Q. From the time you landed in the backyard until
9 you were placed in handcuffs, how much time was that?

10 A. From the -- oh, till the time I was placed in
11 handcuffs or till --

12 Q. Let's say handcuffs first.

13 A. I would say three to four minutes.

14 Q. Okay. From -- have you now told me about
15 everything that you and Officer Gunn talked about from
16 the time you first saw him until you were on top of the
17 wall?

18 A. I believe so.

19 Q. And until you made it onto the other side of the
20 wall in the backyard, you had no physical contact with
21 Officer Gunn; is that right?

22 A. Nothing.

23 Q. Okay. So during the three to four minutes you
24 were in the backyard before you were handcuffed, you
25 believe you were Tased either five or six times; is that

1 right?

2 A. Correct.

3 Q. And you believe you were struck four times --
4 twice on the shoulder and twice on the head?

5 A. Yes.

6 Q. Is that the only force that was used against you
7 during that period of time?

8 A. By Officer Gunn?

9 Q. Correct.

10 A. Yes.

11 Q. I want you to just make this clear.

12 Take me through everything that you recall
13 Officer Gunn saying to you during those three to four
14 minutes after you went over the wall and before you were
15 handcuffed.

16 A. I only heard his voice one time.

17 Q. And what did he say at that time?

18 A. "Shut the fuck up, and I'll stop."

19 Q. And was that -- when was that in relation to the
20 four strikes that you felt?

21 A. Maybe -- just a few seconds afterwards. Maybe
22 eight to ten seconds afterwards. It was almost
23 immediate.

24 Q. Did you say anything other than what you've
25 already talked about during your depositions during those

Page 398

1
2
3 I, SUSAN C. CAMPANA, a certified shorthand
4 reporter of the State of California, do hereby certify:

5 That the foregoing proceedings were taken before
6 me at the time and place therein set forth; that any
7 witnesses in the foregoing proceedings, prior to
8 testifying, were placed under oath; that a verbatim
9 record of the proceedings was made by me using machine
10 shorthand which was thereafter transcribed under my
11 direction; further, that the foregoing is an accurate
12 transcription thereof;

13 That before completion of the deposition,
14 review of the transcript was requested;

15 I further certify that I am neither financially
16 interested in the action nor a relative or employee of
17 any attorney or any of the parties.

18
19 IN WITNESS WHEREOF, I have this date subscribed
20 my name.

21
22 Dated: June 4, 2012
23
24

SUSAN C. CAMPANA, CSR NO. 9573, RPR

25
Page 420

EXHIBIT D

DECLARATION OF PRESTON SMITH

I, Preston Smith., declare and state as follows:

1. I am the Plaintiff in the above captioned action. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. On April 10, 2009 I was being questioned by City of Burbank Police Officers near a liquor store in the City of Burbank. After being questioned by the City of Burbank Police Officers I ran from the Police Officers.

3. I was apprehended by the Police Officers and was tasered in my low back by Officer Gunn and at which point I fell to the ground immobilized. While lying on the ground, in a face down position, I told Officer Gunn that "OK, you've got me." I remained face down on the ground and I did not attempt to move or stand up. Officer Gunn continued to taser me a second and third time, causing me to go into convulsions. While I was still immobilized on the ground, I begged Officer Gunn "please don't shock me again." In response, Officer Gunn told me "f---k you, asshole, how do you like that, that will teach you to run," at which time

1 Officer Gunn tasered me a fourth and fifth time. Officer Gunn tasered me again
2 and then hit me a number of times with his flashlight.
3

4 4. City of Burbank Police Officer Baumgarten smashed his knee into my
5 back area. I do not at this point recall specifically what Officer Edwards did
6 although he was present.
7

8
9 I declare under penalty of perjury pursuant to the laws of the State of
10 California that the foregoing is true and correct.
11

12
13
14 Executed this 26th day of April, 2011, at Castaic, California.
15

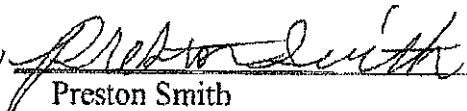
16
17
18 By 
19 Preston Smith
20

EXHIBIT E

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

9BR 01 353

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff

Case No.

vs.

PRESTON LEONARD SMITH

MISDEMEANOR COMPLAINT

Defendant

FILED
LOS ANGELES SUPERIOR COURT

APR 14 2009

JOHN A. CLARKE, CLERK
BY D. CAMACHO, DEPUTY

The undersigned declarant and complainant is informed and believes that:

COUNT I

On or about April 10, 2009, in the above-entitled Judicial District, PRESTON LEONARD SMITH did willfully and unlawfully attempt by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, a violation of Section 69 of the PENAL CODE of the State of California, a misdemeanor.

COUNT II

On or about April 10, 2009, in the above-entitled Judicial District, PRESTON LEONARD SMITH did willfully and unlawfully resist, delay or obstruct a public officer discharging or attempting to discharge any duty of his office or employment, to wit: RAN FROM OFFICER GUNN DURING LAWFUL DETENTION AND DESPITE ORDERS TO STOP; USED ELBOWS AND HANDS IN A FIST TO STRIKE OFFICER BAUMGARTEN, OFFICER EDWARDS, OFFICER JOEL, OFFICER RODRIGUEZ AND OFFICER GUNN DURING OFFICERS ATTEMPT TO LAWFULLY RESTRAIN THE DEFENDANT; FLAILED ARMS AND KICKED LEGS WHEN OFFICER

City Attorney's Office

BAUMGARTEN, OFFICER EDWARDS, OFFICER JOEL, OFFICER RODRIGUEZ AND
OFFICER GUNN TRIED TO DETAIN THE DEFENDANT, a violation of Section 148(a)(1) of the
PENAL CODE of the State of California, a misdemeanor. ✓

COUNT III

On or about April 10, 2009, in the above-entitled Judicial District, PRESTON LEONARD SMITH did
willfully and unlawfully use, or be under the influence of a controlled substance, to wit: COCAINE, a
violation of Section 11550(a) of the HEALTH & SAFETY CODE of the State of California, a
misdemeanor. ✓

COUNT IV

On or about April 10, 2009, in the above-entitled Judicial District, PRESTON LEONARD SMITH did
willfully and unlawfully possess a device, instrument, or paraphernalia designed for injecting or smoking a
controlled substance, a violation of Section 11364 of the HEALTH & SAFETY CODE of the State of
California, a misdemeanor.

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense
counsel provide discovery to the People as required by Penal Code Section 1054.3.

Further, attached hereto and incorporated herein are official reports and documents of a law enforcement
agency which the undersigned believes establish probable cause for the arrest of PRESTON LEONARD
SMITH, for the above-listed crimes

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Burbank, County of Los Angeles, State of California, on April 14, 2009


Declarant and Complainant

EXHIBIT F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

MISDEMEANOR SENTENCING MEMORANDUM - GENERAL MISDEMEANORS

Defendant: <u>PIERCE, JIM TH</u>	Case No: <u>9920353</u>
Date: <u>2/9/09</u>	Dept/Div: <u>2</u>
Prosecutor: <u>WET</u>	Defense Atty: <u>ZALOW</u>
Judge: <u>11/ARDE</u>	Reporter: <u>EVANS</u>
Clerk: <u>01212</u>	Interpreter/Language:

Arraignment For Judgment

I Arraign you for judgment and time for sentencing waived. There is no legal cause why judgment should not now be pronounced.

As to Count 227 a violation of § 148 of the [] Penal Code [] H&S Code [] W&I Code [] Veh. Code [] Code

Sentence

1. [] Probation is denied. Defendant is to serve _____ days in the Los Angeles County Jail, forthwith, [] consecutive to _____ [] concurrent _____.
- Defendant is to receive credit of _____ days actual plus _____ days GT/WT, for a total of _____ days. [] Time may be served in any penal institution.
2. [] Pay a fine of \$ _____ plus penalty assessments.
3. [] Pay the fines and assessments as set forth in paragraph 20 below.
4. [] Execution of the foregoing sentence is suspended (ESS), and the following conditional sentence is imposed:

Conditional Sentence (PC §1203b) Order of Probation (PC §1203a)

1. Imposition of sentence is suspended (ISS) [] With supervision by county probation officer (formal probation).

for a period of _____ years/months upon the following terms and conditions:

1. [] Serve 30 days in the Los Angeles County Jail, [] consecutive to _____ [] concurrent with _____ [] Suspended.
- Defendant to receive custody credit of 80 days actual plus 10 days GT/WT, for a total of _____ days. [] Time may be served in any penal institution.
- [] Time may be served on consecutive weekends of two days each, beginning _____ (772)
- [] Time may be served in any city jail having actual confinement, at the defendant's expense. (021)
- [] Defendant may not participate in Sheriff's home detention/EHM per PC §1203.016(e). (771) [] Work furlough not allowed.
2. [] Perform _____ days of Community Labor (CalTrans, MTA-MAARS, HBT, graffiti removal, beach cleanup, community cleanup, _____, or perform _____ days/hours of approved Community Service, with credit for _____ days actual. Sign up for such work only at a court-approved volunteer center or in the clerk's office. Failure to complete all court-ordered work without excuse may result in jail. [] This work is in lieu of the days of jail specified in paragraph 1 above.
3. [] Pay a fine in the sum of \$ _____ plus penalty assessments, or in default thereof serve _____ additional days in County Jail, consecutive, or perform _____ days of Community Labor or Community Service. [] Defendant elects jail in lieu of fine, forthwith, consecutive to all other time.
- [] Fine may be paid in monthly installments of not less than \$ _____ (124) [] Defendant to report to Financial Evaluator to work out a fine payment plan. (163)
4. [] Do not own, use or possess dangerous or deadly weapons, including firearms or other concealable weapons. (230) [] The weapon involved in this case is ordered confiscated and destroyed by the arresting agency. (234) [] This prohibition is for 10 years as to any firearm pursuant to PC §12021(c)(1). ()
5. [] Do not use or threaten to use force or violence against any person. Do not annoy, harass or molest any victim or witness in this case, especially _____ (013)
- [] Stay [] _____ [] 100 yards away from and have no contact with _____ (904)
- [] Stay [] _____ [] 100 yards from [] the location of the arrest [] _____ (904)
- [] Obey any Protective Order issued in this or any other case. (579) [] Defendant is served with a copy of the Protective Order in open court. (578)
- [] Enroll within 30 days and successfully complete: _____ (373)
6. [] Do not own, use, or possess any controlled substances, or associated paraphernalia, except with valid prescription, and stay away from places where users, buyers, sellers, congregates. Do not associate with persons known by you to be controlled substance users or sellers, except while attending a drug treatment program. (926)
7. [] Do not consume or possess any alcoholic beverage and stay out of places where they are the chief item of sale. (901)
- [] Do not consume or possess any alcoholic beverages before you turn age 21. (344)
8. [] Attend _____ Alcoholics / Narcotics / Sexual Compulsives Anonymous meetings at the rate of _____ meeting(s) per week for _____ weeks. (356/473)
9. [] Submit your person and property to search and seizure at any time of the day or night any peace officer, with or without a warrant, probable cause, or reasonable suspicion. (576)
10. [] Use only your true name, stated to be: _____ (524) Do not give any false information to any peace officer at any time. (535)
11. [] Do not associate with any persons known by you to be criminal street gang members, affiliates, or associates, and stay away from all places where you know such persons congregate, except in an authorized anti-gang program. (918) Obey any gang injunction that applies to you. (399)
12. [] Do not own, use, possess, buy or attempt to buy, or sell any aerosol paint containers, felt tip markers, any glass or metal scribers, any masonry, glass or carbide drill bit, any grinding stone, any awl, chisel, carbide scribe, and any other device or implement capable of marking or marring any property or writing any graffiti. (921)
13. [] Pursuant to VC §18202.6, your driver's license is suspended for one year. (247) You are to surrender your license to the clerk forthwith. (Vandalism cases) (273)
- [] License Suspend.
14. [] Provide a DNA sample and print impressions pursuant to PC § 296 and 296.1. (790)
15. [] Make restitution to victim _____ pursuant to PC §1202.4(b) (048) [] in an amount to be determined at a hearing. (067)
- [] in the stipulated sum of \$ _____ (048) [] per any final civil judgment against you. (100) [] Liability is admitted but amount is disputed.
16. [] Pay all of the following (check all that apply):
- [] A restitution fine of [] \$100.00, [] \$ _____ per PC §1202.4(b) through (e). (098)
- [] A probation revocation restitution fine of [] \$100.00, [] \$ _____ per PC §1202.44, payment is stayed until probation is revoked and sentence imposed.
- [] A crime prevention fine of \$10.00 per PC §1202.5 (PC theft-related and vandalism cases). (ADL SA:CP)
- [] A court security fee of \$20.00 per PC §1465.1(a)(1). (ADL SA:SF)
- [] A sex offender fine of [] \$200.00 (1st offense) [] \$300 (2nd and subsequent offenses) per PC §290.3.
- [] An administrative screening fee of \$25.00 per Gov't Code §29550(f). (If defendant arrested and released by arresting agency.)
- [] A citation processing fee of \$10.00 per Gov't Code §29550(f). (If defendant arrested and cited out by the arresting agency.)
- [] A criminal justice administration reimbursement fee of \$ _____, payable to the local arresting agency, per Gov't Code §29550.1 or Gov't Code §29550.2.

1. []

2. [] Obey all laws and orders of the court (541) [] and rules, regulations and instructions of the Probation Department. (542)

Defendant acknowledges that he/she understands and accepts the foregoing terms and conditions of probation. (821)

Defendant is ordered to pay attorney fees. [] in the amount of \$ _____ [] in the amount determined by the Financial Evaluator.

Counts/Allegations 1-4 are dismissed/stricken on the People's motion pursuant to Penal Code Section 1385 as to this defendant.

Compliance Dates: Defendant is ordered to appear in person on each of the following compliance dates. (683)

Surrender for jail:	POE/ Progress report on:
Pay fees by: <u>7/29/10</u>	Restitution Hearing in Div/Dopt. _____
Complete work/c-s by:	Other:

Defendant understands, accepts and agrees to comply with the terms and conditions of this conditional sentence and agrees to return to Court as ordered.

Defendant's Signature: <u>IN CUSTODY</u>	Attorney's Signature: <u>[Signature]</u>
Defendant's Address: _____	
Defendant's Telephone: _____	

JUDGE CARLOS E. VELARDE
Judge/Commissioner of the Superior Court

EXHIBIT "B"

EXHIBIT G

SUPERIOR COURT OF CALIFORNIA		Preserved for Case's File Stamp FILED LOS ANGELES SUPERIOR COURT APR 29 2009 JOHN A. CLARKE, CLERK MICHAEL ORTIZ, DEPUTY 9BRO 1353
COUNTY	COUNTY OF LOS ANGELES	
PLAINTIFF	PEOPLE OF THE STATE OF CALIFORNIA	
DEFENDANT	<i>Preston Smith</i>	
MISDEMEANOR ADVISEMENT OF RIGHTS, WAIVER, AND PLEA FORM		

INSTRUCTIONS

Fill out this form if you wish to plead guilty or no contest to the charges against you. Initial the box for each applicable item only if you understand it, and **sign and date the form on page 3**. If you have any questions about your case, the possible sentence, or the information on this form, ask your attorney or the judge.

RIGHT TO AN ATTORNEY

1. I understand that I have the right to be represented by an attorney throughout the proceedings. I understand that the Court will appoint a free attorney for me if I cannot afford to hire one, but at the end of the case, I may be asked to pay all or part of the cost of that attorney, if I can afford to. I understand that there are dangers and disadvantages to giving up my right to an attorney, and that it is almost always unwise to represent myself.

INITIALS ↓

1. *PS***NATURE OF THE CHARGES (Complete all items you are charged with.)**

2. I understand that I am charged with the following offense(s):

P/C 146 - resisting arrest, 1451150, under the influence

TYPE OF OFFENSE(S) AND SECTION NUMBER(S)

3. If applicable - I understand that I am also charged with having the following prior conviction(s):

LIST OFFENSE(S), CASE NUMBER(S) AND DATE(S)

3. *X*

4. If applicable - I understand that I am also charged with violating the probation order in the following case(s):

CASE NUMBER(S) AND DATE(S)

4. *X*

5. I understand the charge(s) against me, and the possible pleas and defenses.

5. *PS***CONSTITUTIONAL RIGHTS**

6. **RIGHT TO A JURY TRIAL** - I understand that I have the right to a speedy, public jury trial. At the trial, I would be presumed innocent, and I could not be convicted unless 12 impartial jurors were convinced of my guilt beyond a reasonable doubt.
7. **RIGHT TO CONFRONT WITNESSES** - I understand that I have the right to confront and cross-examine all witnesses testifying against me.
8. **RIGHT AGAINST SELF-INCRIMINATION** - I understand that I have the right to remain silent and not incriminate myself, and the right to testify on my own behalf. I understand that by pleading guilty or no contest, or admitting prior conviction(s) or probation violation(s), I am incriminating myself.
9. **RIGHT TO PRODUCE EVIDENCE** - I understand that I have the right to present evidence and to have the Court issue subpoenas to bring into court all witnesses and evidence favorable to me, at no cost to me.

6. *PS*7. *PS*8. *PS*9. *PS*

RIGHTS ON CHARGES OF PRIOR CONVICTION(S) AND PROBATION VIOLATION(S)

10. If applicable - I understand that I have the right to an attorney, the right to a jury trial, the right to confront witnesses, the right against self-incrimination, and the right to produce evidence for all the charges against me, including any charged prior conviction(s) or probation violation(s). However, for a charge of violating probation, I do not have the right to a jury trial, although I do have the right to a hearing before a judge.

INITIALS ↓

10.

WAIVER OF RIGHTS

Understanding all this, for all the charges against me, including any prior conviction(s) or probation violation(s):

11.

12.

13.

14.

15.

11. I give up my right to an attorney, and I choose to represent myself. (Does not apply if you have an attorney.)
12. I give up my right to a jury trial.
13. I give up my right to confront and cross-examine witnesses.
14. I give up my right to remain silent and to not incriminate myself.
15. I give up my right to produce evidence and witnesses on my own behalf.

CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST

16. **Penalty:** I understand that the possible consequences for the offense(s) charged include the following:

0 9/2/10
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

0 14311550
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

0
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

0
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

0
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

0
SECTION NUMBER

JAIL - MIN.

MAX.

FINE - MIN.

MAX.

OTHER CONSEQUENCES:

16.

17.

18.

17. I understand that in addition to the fine, the Court will add assessments which will significantly increase the amount I must pay. I will also be ordered to make restitution and to pay a restitution fine of \$100 to \$1,000, unless the Court finds compelling and extraordinary reasons not to impose the fine.

18. I understand that if I am not a citizen, a plea of guilty or no contest could result in my deportation, exclusion from admission to this country, or denial of naturalization.

CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST (Continued)

19. I understand that a plea of no contest (*nolo contendere*) will have exactly the same effect in this case as a plea of guilty, but it cannot be used against me in a civil lawsuit which is based upon, or growing out of the act upon which the criminal prosecution is based, unless the offense is punishable as a felony.
20. I understand that any plea entered in this case may be grounds for violating probation or parole which has previously been granted to me in any other case.

PLEA(S)

21. I hereby freely and voluntarily plead Guilty to the following:

P/C 148, H&J 10570
GUILTY OR NO CONTEST
LIST CHARGE(S)

22. I understand that I have the right to a delay of from 6 hours to 5 days prior to being sentenced. I give up this right and agree to be sentenced at this time.
23. If applicable - I freely and voluntarily admit the prior conviction(s) I listed on this form. I understand that this admission will increase the penalties which are imposed on me.
24. If applicable - I freely and voluntarily admit the probation violation(s) I listed on this form and give up my right to a hearing before a judge regarding the probation violation(s).
25. If applicable - I understand that I have the right to enter my plea before, and to be sentenced by, a judge. I give up this right and agree to enter my plea before, and to be sentenced by,

TEMPORARY JUDGE'S NAME

INITIALS ↓	
19.	PS
20.	PS
21.	PS
22.	PS
23.	PS
24.	PS
25.	X

**** DEFENDANT'S SIGNATURE:**

[Signature]

DATE:

4/29/08

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed the form and any addenda with my client. I have explained each of the defendant's rights to the defendant and answered all of the defendant's questions with regard to this plea. I have also discussed the facts of the defendant's case with the defendant, and explained the consequences of this plea, the elements of the offense(s), and the possible defenses. I concur in this plea and in the defendant's decision to waive his or her constitutional rights.

SIGNATURE OF DEFENDANT'S ATTORNEY

[Signature]

DATE

4/29/08

INTERPRETER'S STATEMENT (if applicable)

I, having been sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language indicated below. The defendant stated that (s)he understood the contents of the form, and then (s)he initialed and signed the form.

Language: ☐ Spanish ☐ Other (specify): _____

COURT INTERPRETER'S SIGNATURE

TYPE OR PRINT NAME

DATE

COURT'S FINDINGS AND ORDER

The Court, having reviewed this form and any addenda, and having questioned the defendant concerning the defendant's constitutional rights and the defendant's admission of prior conviction(s) and probation violation(s), if any, finds that the defendant has expressly, knowingly, understandingly and intelligently waived his or her constitutional rights. The Court finds that the defendant's plea(s) and admission(s) are freely and voluntarily made with an understanding of the nature and consequences thereof, and that there is a factual basis for the plea(s). The Court accepts the defendant's plea(s), the defendant's admission of prior conviction(s) and probation violation(s), if any, and orders this form filed and incorporated in the docket by reference as though fully set forth therein.

- _____
☒ Judge of the Superior Court
☐ Temporary Judge of the Superior Court

4/21/09

DATE

EXHIBIT H

1
2
3
4
5
6
7
8
9
0

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NC-2 HON. CARLOS E. VELARDE, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,

VS.

PRESTON SMITH,

DEFENDANT.

NO. 9BR01353

1
2
3
4
5
6
7
8

REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, APRIL 29, 2009

9
0
1
2

APPEARANCES:

FOR THE PLAINTIFF:

DENNY WEI
DEPUTY CITY ATTORNEY

3
4

FOR THE DEFENDANT:

MARK ZAVIDOW
ALTERNATE PUBLIC DEFENDER

5
6
7
8

COPY

LYNN M. EVANS
OFFICIAL REPORTER
CSR NO. 5164

1 CASE NUMBER: 9BR01353
2 CASE NAME: PEOPLE VS. PRESTON SMITH
3 BURBANK, CA WEDNESDAY, APRIL 29, 2009
4 DEPARTMENT NC-2 HON. CARLOS E. VELARDE, JUDGE
5 COURT REPORTER: LYNN M. EVANS, CSR NO. 5164
6 TIME: 10:09 A.M.

7 --000--

8
9 THE COURT: PRESTON SMITH.

10 MR. ZAVIDOW: IT IS, YOUR HONOR.

11 HE IS PRESENT.

12 THE COURT: COUNSEL, GIVE ME A MOMENT TO PREPARE THE
13 SENTENCING SHEET.

14 MR. ZAVIDOW: THANK YOU.

15 (BRIEF PAUSE.)

16 THE COURT: HOW MANY DAYS HAS HE BEEN IN CUSTODY,
17 COUNSEL? IS THIS A TIME-SERVED SITUATION?

18 MR. ZAVIDOW: IT IS, YOUR HONOR. AND THIS WOULD BE
19 FROM -- SO WE'RE TALKING ABOUT 20 DAYS.

20 THE COURT: TWENTY DAYS ACTUAL.

21 MR. ZAVIDOW: YES.

22 MR. WEI: SO 30.

23 (BRIEF PAUSE.)

24 THE COURT: OKAY. PRESTON SMITH?

25 THE DEFENDANT: YES, SIR.

26 THE COURT: MR. SMITH, I THINK WE HAVE A SETTLEMENT ON
27 YOUR CASE, AND I'D LIKE TO GO OVER THE TERMS OF THE SETTLEMENT
28 SO YOU KNOW EXACTLY WHAT YOU ARE PLEADING TO AND THE

1 CONSEQUENCES OF YOUR PLEA.

2 I'M HOLDING THIS GREEN WAIVER FORM IN MY HAND.

3 ARE THESE YOUR INITIALS AND SIGNATURE ON THIS GREEN FORM?

4 THE DEFENDANT: YES, YOUR HONOR.

5 THE COURT: THAT INDICATES THAT AS PART OF THE
6 SETTLEMENT, YOU ARE GIVING UP CERTAIN CONSTITUTIONAL RIGHTS
7 THAT ARE LISTED IN THIS FORM, IS THAT CORRECT?

8 THE DEFENDANT: YES.

9 THE COURT: AND UNDER THE TERMS OF THE SETTLEMENT,
10 YOU'LL BE PLEADING TO TWO COUNTS. YOU'LL BE PLEADING TO
11 COUNT 2, A VIOLATION OF PENAL CODE SECTION 148(A)(1), THAT YOU
12 DID WILLFULLY RESIST OR DELAY AN OFFICER FROM DISCHARGING HIS
13 DUTIES.

14 AND IN COUNT 3, A VIOLATION OF 11550(A) OF THE
15 HEALTH AND SAFETY CODE, THAT YOU DID WILLFULLY AND UNLAWFULLY
16 USE AND YOU WERE UNDER THE INFLUENCE OF A CONTROLLED
17 SUBSTANCE, TO WIT, COCAINE.

18 DO YOU UNDERSTAND THE NATURE OF THE CHARGES YOU
19 ARE PLEADING TO?

20 THE DEFENDANT: YES, SIR.

21 THE COURT: THEY ARE BOTH MISDEMEANORS?

22 THE DEFENDANT: YES, SIR. YES, YOUR HONOR.

23 THE COURT: IF YOU PLEAD TO THOSE TWO CHARGES, THEN
24 YOU'LL BE PLACED ON SUMMARY PROBATION FOR TWO YEARS. YOU'LL
25 RECEIVE A SENTENCE OF 30 DAYS IN THE COUNTY JAIL; HOWEVER,
26 YOU'LL RECEIVE CREDIT FOR 20 PLUS 10 -- IN OTHER WORDS, TIME
27 SERVED -- AND OTHER STANDARD CONDITIONS OF PROBATION, AND THE
28 CONDITIONS WILL RUN CONCURRENT, THAT'S TO EACH OTHER, AND THEN

1 WE'LL BE DISMISSING THE OTHER CHARGES, THAT'S COUNTS 1 AND 4.
2 DO YOU UNDERSTAND?

3 THE DEFENDANT: YES, YOUR HONOR.

4 THE COURT: AS TO COUNT 2, A VIOLATION OF 148(A)(1) OF
5 THE PENAL CODE, A MISDEMEANOR, HOW DO YOU PLEAD?

6 THE DEFENDANT: GUILTY, YOUR HONOR.

7 THE COURT: AND AS TO COUNT 3, A VIOLATION OF 11550(A)
8 OF THE HEALTH AND SAFETY CODE, ALSO A MISDEMEANOR, HOW DO YOU
9 PLEAD?

10 THE DEFENDANT: NO CONTEST, YOUR HONOR.

11 THE COURT: LET THE RECORD SHOW THE COURT HAVING
12 QUESTIONED THE DEFENDANT CONCERNING HIS CONSTITUTIONAL RIGHTS,
13 WAIVERS, PLEAS AS TO BOTH COUNTS, CONSEQUENCES, THE COURT IS
14 SATISFIED AND WILL ACCEPT THE PLEAS.

15 MR. ZAVIDOW: YES. COUNT 3 IS THE ONE TO WHICH HE
16 PLED NO CONTEST.

17 THE COURT: YES.

18 MR. ZAVIDOW: AND THE COURT COULD AMEND THAT, IF HE
19 WANTS TO, ON THE GREEN SLIP THAT WAS TURNED IN. IT INDICATES
20 GUILTY, GUILTY AS TO COUNT 2.

21 THE COURT: GUILTY AS TO 148.

22 MR. WEI: YOUR HONOR, WE CAN'T. SINCE IT'S ONE WAIVER
23 FORM, HE'LL HAVE TO PLEAD GUILTY TO COUNT 3.

24 THE DEFENDANT: GUILTY, YOUR HONOR.

25 THE COURT: SO WE HAVE GUILTY AS TO BOTH COUNTS,
26 COUNSEL, IS THAT CORRECT?

27 MR. ZAVIDOW: I DON'T BELIEVE THAT THAT'S NECESSARY.
28 I THINK THE COURT COULD ACCEPT HIS ORAL NO CONTEST AND JUST

1 LET IT BE.

2 MR. WEI: I WOULD -- I'M ASKING FOR GUILTY ON BOTH.

3 THE COURT: WE'LL NEED A SECOND WAIVER FORM.

4 MR. ZAVIDOW: OKAY. GUILTY. FINE.

5 THE COURT: GUILTY AS TO BOTH COUNTS, THE RECORD WILL
6 SO INDICATE.

7 IS THE DEFENDANT READY FOR SENTENCING, NO LEGAL
8 CAUSE?

9 MR. ZAVIDOW: YES.

10 THE COURT: THE DEFENDANT HAVING PLED TO COUNTS 2
11 AND 3, VIOLATION OF PENAL CODE SECTION 148(A)(1), AND
12 COUNT 3, HEALTH AND SAFETY CODE SECTION 11550(A), THE SENTENCE
13 OF THE COURT AND THE CONDITIONS RUN CONCURRENT.
14 IMPOSITION OF SENTENCE IS SUSPENDED. HE'S PLACED ON SUMMARY
15 PROBATION FOR TWO YEARS UNDER THE FOLLOWING TERMS AND
16 CONDITIONS:

17 HE'S TO SERVE 30 DAYS IN THE COUNTY JAIL.
18 HE'LL RECEIVE CREDIT FOR 20 PLUS 10; IN OTHER WORDS, TIME
19 SERVED.

20 HE'S NOT TO OWN, USE, POSSESS ANY CONTROLLED
21 SUBSTANCE OR ASSOCIATED PARAPHERNALIA EXCEPT WITH A VALID
22 PRESCRIPTION, AND STAY AWAY FROM PLACES WHERE BUYERS, USERS
23 AND SELLERS CONGREGATE.

24 DO NOT ASSOCIATE WITH PERSONS KNOWN BY YOU TO
25 BE CONTROLLED SUBSTANCE ABUSERS OR SELLERS EXCEPT WHILE
26 ATTENDING ANY DRUG TREATMENT PROGRAM.

27 THE DEFENDANT IS ORDERED TO PAY A RESTITUTION
28 FINE OF \$100, A PROBATION REVOCATION RESTITUTION FINE OF \$100.

1 THAT'S STAYED UNLESS PROBATION IS REVOKED. A COURT SECURITY
2 FEE OF \$20. HE'S TO OBEY ALL LAWS AND ORDERS OF THE COURT.

3 DO YOU UNDERSTAND AND ACCEPT THE TERMS AND
4 CONDITIONS OF PROBATION?

5 THE DEFENDANT: YES, YOUR HONOR.

6 THE COURT: IS THERE A MOTION AS TO COUNTS 1 AND 4?

7 MR. WEI: YES. 1385 PER PLEA.

8 THE COURT: GIVE HIM A YEAR TO PAY THE FEES TO THE
9 COURT, COUNSEL?

10 MR. ZAVIDOW: YOUR HONOR, THAT'S FINE.

11 THE COURT: 4-29-10.

12 MR. ZAVIDOW: YOUR HONOR, I DO WANT THE COURT TO KNOW
13 THAT HE'S GOING TO BE IN CUSTODY ON ANOTHER MATTER THAT WILL
14 MAKE IT VIRTUALLY IMPOSSIBLE THAT HE MEETS THAT DEADLINE, BUT
15 I DON'T KNOW WHAT ELSE YOU CAN DO.

16 MR. WEI: WE'LL EXTEND THE DEADLINE, THAT'S THE BEST
17 WAY.

18 HOW LONG WILL HE BE IN CUSTODY?

19 THE COURT: IF HE DOESN'T PAY, IT WILL GO TO CIVIL
20 COLLECTION WITH THE COURT. THERE IS NO FINE, AT LEAST THAT'S
21 MY UNDERSTANDING.

22 MR. ZAVIDOW: OKAY.

23 THE COURT: THAT IS THE SENTENCE OF THE COURT.

24 I GUESS THE ONLY -- NO. STRIKE THAT. HE HAS
25 TIME SERVED.

26 (PROCEEDINGS CONCLUDED.)

27 --000--

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NC-2

HON. CARLOS E. VELARDE, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

PRESTON SMITH,

DEFENDANT.

NO. 9BR01353

REPORTER'S
CERTIFICATE

I, LYNN M. EVANS, OFFICIAL REPORTER OF
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE
COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE
FOREGOING PAGES 1 THROUGH 5, INCLUSIVE, COMPRISE A
FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS
HELD IN THE ABOVE-ENTITLED MATTER ON WEDNESDAY,
APRIL 29, 2009.

DATED THIS ^{28th}~~29th~~ DAY OF JANUARY, 2011.



LYNN M. EVANS
OFFICIAL REPORTER
CSR NO. 5164, RMR, CRR

EXHIBIT I

1 DAVID D. LAWRENCE, State Bar No. 123039
dlawrence@lbaclaw.com
2 DENNIS M. GONZALES, State Bar No. 59414
dgonzales@lbaclaw.com
3 NATHAN A. OYSTER, State Bar No. 225307
noyster@lbaclaw.com
4 LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
5 Glendale, California 91210-1219
Telephone No. (818) 545-1925
6 Facsimile No. (818) 545-1937

7 Attorneys for Defendant
Burbank Police Department Officer Gunn
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 PRESTON SMITH, an individual;

13 Plaintiff,
14

15 vs.

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
18 BURBANK POLICE DEPARTMENT
19 OFFICER GUNN; BURBANK
20 POLICE DEPARTMENT OFFICER
21 BAUMGARTEN; BURBANK
22 POLICE DEPARTMENT OFFICER
23 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE

24 Defendants.
25

Case No. CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**STIPULATION FOR AN ORDER
STAYING THE CASE, VACATING
THE TRIAL, AND VACATING
ALL PRE-TRIAL DATES**

Trial Date: November 8, 2011
Time: 8:30 a.m.
Courtroom: 9

26 TO THE CLERK OF THE COURT, ALL INTERESTED PARTIES AND
27 THEIR ATTORNEYS OF RECORD:
28

//

//

//

1 Plaintiff PRESTON SMITH (hereinafter "Plaintiff") and Defendants CITY
2 OF BURBANK, BURBANK POLICE DEPARTMENT, OFFICER
3 BAUMGARTEN, OFFICER EDWARDS, and OFFICER GUNN (hereinafter
4 "Defendants"), through their respective attorneys of record, hereby enter into the
5 following stipulation:

6 1. This litigation relates to the April 10, 2009 arrest of Plaintiff
7 PRESTON SMITH by officers from the Burbank Police Department.

8 2. On April 29, 2009, Plaintiff PRESTON SMITH pled guilty to
9 violating California Penal Code § 148(a)(1) as a result of the arrest. This
10 conviction has not been expunged, withdrawn, or overturned.

11 3. Counsel for all parties have been advised and believe that the Los
12 Angeles Sheriff's Department is currently conducting a criminal investigation
13 into the allegations made by Mr. Smith concerning his arrest.

14 4. Plaintiff recently noticed the depositions of all three individual
15 Defendants. The depositions were noticed for March 3, 2011 and March 8, 2011.

16 5. After meeting and conferring on these issues, all counsel agree that
17 the individual Defendants cannot be deposed until the Los Angeles Sheriff's
18 Department has completed its investigation, because of the officers' Fifth
19 Amendment rights.

20 6. The parties are not certain when the investigation conducted by the
21 Los Angeles Sheriff's Department will be completed. Furthermore, the parties
22 cannot control when the investigation of the Los Angeles Sheriff's Department
23 will be completed.

24 7. To allow for the completion of this investigation without interfering
25 with the Fifth Amendment rights of the individual Defendants, the parties
26 respectfully request that the Court vacate all trial and pretrial dates until the
27 investigation has been completed.

28 8. The parties disagree as to the issues set forth in paragraphs 9 and 10

1 of this Stipulation. The parties' respective positions are set forth below.

2 9. Defendants request that the Court stay all proceedings with the
3 exception that the Court allow the filing and hearing of motions pursuant to Rule
4 12(c) of the Federal Rules of Civil Procedure, focused on whether Plaintiffs
5 claims are barred by his conviction for violating California Penal Code §
6 148(a)(1) under the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477, 114
7 S.Ct. 2364 (1994), hereinafter "the *Heck* motions". Defendants contend that the
8 *Heck* motions will be based upon the pleadings in this action and the court file in
9 the underlying criminal action against Plaintiff PRESTON SMITH. Defendants
10 further contend that Plaintiff does not need to conduct discovery to oppose the
11 *Heck* motions.

12 10. Plaintiff requests that the Court stay all proceedings in this matter
13 until the investigation has been completed. Plaintiff contends that the depositions
14 of the individual Defendants must be completed before Plaintiff can oppose the
15 *Heck* motions.

16 11. If the Court is inclined to agree with the position set forth by
17 Defendants in paragraph 9 of this Stipulation, the parties propose a hearing date
18 of May 16, 2011 for the *Heck* motions.

19 12. The parties jointly propose a schedule in which the parties will
20 submit a Joint Status Report to this Court by May 16, 2011 advising the Court as
21 to whether the investigation being conducted by the Los Angeles Sheriff's
22 Department has been completed. The parties will submit further Joint Status
23 Reports every 60 days thereafter until the investigation being conducted by the
24 Los Angeles Sheriff's Department has been completed.


25 13. Plaintiff's counsel is scheduled for surgery on March 9, 2011, and
26 has been advised by his surgeon, Dr. Andrew DaLio, that he will not be able to
27 work for a minimum of four weeks following surgery. Should the Court schedule
28 the *Heck* motions without providing Plaintiff an opportunity to depose the

1 Defendant police officers, and in view of counsel's extended recovery period
2 following surgery, Plaintiff proposes May 16, 2011 as the hearing date for the
3 *Heck* motions. Defendants are amenable to this request.

4 The parties respectfully request that the Court enter an Order consistent
5 with this Stipulation.


6
7 Dated: February 25, 2011

LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation

8
9
10 By 
11 Max A. Sauler
12 Attorney for Plaintiff
13 Preston Smith

14 Dated: February 28, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

15
16 By 
17 Nathan A. Oyster
18 Attorneys for Defendant
19 Burbank Police Department Officer Gunn

20 Dated: February __, 2011

DENNIS A. BARLOW
City Attorney

21
22 By _____
23 Carol A. Humiston
24 Sr. Assistant City Attorney
25 City of Burbank, Burbank Police
26 Department, Burbank Police Officers
27 Adam Baumgarten and Michael Edwards
28

1 Defendant police officers, and in view of counsel's extended recovery period
2 following surgery, Plaintiff proposes May 16, 2011 as the hearing date for the
3 Heck motions. Defendants are amenable to this request.

4 The parties respectfully request that the Court enter an Order consistent
5 with this Stipulation.

6
7 Dated: February __, 2011

LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation

8
9
10 By _____
11 Max A. Sauler
12 Attorney for Plaintiff
13 Preston Smith

14 Dated: February __, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

15
16 By _____
17 Nathan A. Oyster
18 Attorneys for Defendant
19 Burbank Police Department Officer Gunn

20 Dated: February 27, 2011

DENNIS A. BARLOW
City Attorney

21
22 By _____
23 Carol A. Humiston
24 Sr. Assistant City Attorney
25 City of Burbank, Burbank Police
26 Department, Burbank Police Officers
27 Adam Baumgarten and Michael Edwards
28

EXHIBIT J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 10-8840-VBF (AGRx)**

Dated: **May 13, 2011**

Title: **Preston Smith -v- City of Burbank, et al.**

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Joseph Remigio
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

None Present

PROCEEDINGS (IN CHAMBERS):

COURT ORDER RE DEFENDANT GUNN'S MOTION
FOR JUDGMENT ON THE PLEADINGS (DKT.
#21)

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. **Accordingly, the hearing set for May 16, 2011 at 1:30 p.m. is vacated and the matter taken off calendar.**

I. RULING

The Court has received, read, and considered Defendant Gunn's Motion for Judgment on the Pleadings (dkt. #21); Plaintiff's Preston Smith's Opposition (dkt. #27); and Defendant's Reply (dkt. #28).

For reasons described more fully below, the Court rules as follows:

(1) **DENIES** the Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983. Defendant has not sufficiently shown that Plaintiff's First Cause of Action is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

(2) **DENIES** the Motion for Judgment on the Pleadings as to Plaintiff's Second Cause of Action for Violation of California Civil Code § 52.1,

MINUTES FORM 90
CIVIL - GEN

Initials of Deputy Clerk ire

Third Cause of Action for Intentional Infliction of Emotional Distress and Fourth Cause of Action for Assault and Battery. As Defendant has not sufficiently shown that Plaintiff's Section 1983 cause of action is barred by the *Heck* doctrine, Defendant has also not shown that Plaintiff's state law causes of action are barred. *Yount v. City of Sacramento*, 43 Cal. 4th 885 (2009).

II. BACKGROUND

Plaintiff Preston Smith alleges that on April 10, 2009, Plaintiff and other individuals were being questioned by officers from the Burbank Police Department as they were walking in the vicinity of a liquor store in Burbank. Compl. ¶ 16 (dkt. #1). Plaintiff alleges that, after being questioned by Officer Gunn, he was "tasered" in his lower back by Officer Gunn, causing Plaintiff to fall on the ground and become immobilized. *Id.* ¶ 17. "While lying immobilized on the ground, face down, Plaintiff verbally surrendered and told Defendant Gunn 'OK, you've got me.' Plaintiff remained face down on the ground and did not attempt to move or to stand up, at which time Defendant Gunn 'tasered' him and second and third time, causing Plaintiff to have convulsions." *Id.* Plaintiff alleges that Defendant then tasered him three additional times. *Id.* ¶¶ 17-18. Plaintiff does not dispute the lawfulness of his arrest, nor does he dispute that he resisted arrest. However, Plaintiff alleges that Officer Gunn used excessive force as Plaintiff was being restrained and placed in handcuffs. *Id.*

On April 14, 2009, a four-count misdemeanor complaint was filed against Plaintiff in the Los Angeles Superior Court. See Defendant Gunn's Request for Judicial Notice¹ ("RJN"), Ex. A (dkt. #23). Count II of the complaint alleged that Plaintiff "did willfully and unlawfully resist, delay or obstruct a public officer discharging or attempting to discharge any duty of his office or employment," a violation of California Penal Code § 148(a)(1). *Id.* It alleged that Plaintiff committed the following acts of resistance: (1) Plaintiff ran from Officer Gunn during a lawful detention and despite orders to stop; (2) Plaintiff used elbows and hands in a fist to strike Officers Baumgarten, Edwards, Joel, Rodriguez and Gunn during the Officers' attempt to lawfully restrain Plaintiff; (3) Plaintiff flailed arms and kicked legs when Officers Baumgarten, Edwards, Joel, Rodriguez and Gunn tried to detain him. *Id.* at 1-2.

¹ The Court GRANTS Defendant's Request for Judicial Notice (dkt. #23) of Exhibits A-D. See Fed. R. Evid. 201(b).

MINUTES FORM 90
CIVIL - GEN

Initials of Deputy Clerk ire

On April 29, 2009, Plaintiff pled guilty to violating Count II of the complaint - California Penal Code § 148(a)(1). See Ex. A (Criminal Complaint); Ex. C (Misdemeanor Advisement of Rights, Waiver, and Plea Form), Ex. D (Criminal Transcript). Plaintiff signed a document entitled "Misdemeanor Advisement of Rights, Waiver, and Plea Form", which acknowledges the guilty plea. See RJN, Ex. C. Plaintiff's plea was approved by the Court. See RJN, Ex. B (Sentencing Memorandum); Ex. D (Criminal Transcript).

In this action, Plaintiff alleges four causes of action against Defendants City of Burbank, Burbank Police Department and Burbank Police Officers Baumgarten, Edwards and Gunn: (1) Violation of 42 U.S.C. § 1983; (2) Violation of California Civil Code § 52.1; (3) Intentional Infliction of Emotional Distress; and (4) Assault and Battery (dkt. #1).

III. ANALYSIS

A. Legal Standard

Fed. R. Civ. P. 12(c) provides that "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." "Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). As explained more fully below, the Court finds that the Motion does not show that this standard has been met.

B. First Cause of Action: Violation of 42 U.S.C. § 1983

The Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983.

When a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). "But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed *Id.*"

MINUTES FORM 90
CIVIL - GEN

Initials of Deputy Clerk ire

In this case, Plaintiff pled guilty to a violation of California Penal Code § 148(a)(1). Section 148(a)(1) provides: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]." For a conviction under § 148(a)(1) to be valid, the defendant must have "resist[ed], delay[ed], or obstruct[ed]" a police officer in the lawful exercise of his or her duties. The lawfulness of the officer's conduct is an essential element of the offense under § 148(a)(1). See *People v. Curtis*, 70 Cal.2d 347, 354-56 (1969) ("an officer may only use reasonable force to make an arrest or to overcome resistance").

Plaintiff alleges that, after being questioned by Defendant Gunn, Plaintiff was tasered in his lower back by Defendant Gunn, "causing Plaintiff to fall to the ground and become immobilized. While lying immobilized on the ground, face down, Plaintiff verbally surrendered and told Defendant Gunn 'OK, you've got me.' Plaintiff remained face down on the ground and did not attempt to move or to stand up, at which time Defendant Gunn 'tasered' him and second and third time, causing Plaintiff to have convulsions." Compl. ¶ 17. Plaintiff alleges that Defendant then tasered him three additional times. *Id.* ¶¶ 17-18.

To find that on the face of the Complaint, no material issue of fact remains to be resolved, *Hal Roach Studios, Inc.*, 896 F.2d at 1550, Defendant would need to show that he used reasonable force in arresting Plaintiff or in overcoming Plaintiff's resistance. *People*, 70 Cal.2d at 354-56. The test for whether force is reasonable or excessive is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Cooper*, 490 U.S. 386, 397 (1989).

The Court finds that Defendant has not sufficiently shown that his actions were objectively reasonable, such that no material issue of fact remains to be resolved. See *Hooper v. County of San Diego*, 629 F.3d 1127, 1133 (9th Cir. 2011) ("[W]e conclude that a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during 'one continuous transaction.'"). Defendant has not provided adequate authority or evidence showing that he did not use excessive force in arresting Plaintiff or in overcoming Plaintiff's resistance. A holding that the use of the taser was excessive force would not "negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Plaintiff's] attempt to resist it" *Yount v. City of Sacramento*, 43 Cal. 4th 885, 899 (2009) (internal citations and quotations omitted).

MINUTES FORM 90
CIVIL - GEN

Initials of Deputy Clerk jre

Accordingly, the Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983.

C. Second Cause of Action: Violation of California Civil Code § 52.1; Third Cause of Action: Intentional Infliction of Emotional Distress; Fourth Cause of Action: Assault and Battery

Defendant contends that Plaintiff's state law claims are also barred by his conviction for violation § 148(a)(1), as the California Supreme Court has applied the *Heck* principle to claims brought under California law. *Yount*, 43 Cal. 4th at 902 ("[W]e cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct . . .").

However, as Defendant has not sufficiently shown that the *Heck* doctrine bars Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983, the Court finds that Defendant has also not shown that Plaintiff's state law claims are barred.

Accordingly, the Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's Second Cause of Action for Violation of California Civil Code § 52.1, Third Cause of Action for Intentional Infliction of Emotional Distress, and Fourth Cause of Action for Assault and Battery.

IT IS SO ORDERED.

MINUTES FORM 90
CIVIL - GEN

Initials of Deputy Clerk ire